



INTERNATIONAL INSOLVENCY INSTITUTE

Twelfth Annual International Insolvency Conference

Supreme Court of France

Paris, France

RECOGNITION AND COORDINATION OF INTERNATIONAL DOMESTIC CASES AND OBSTACLES TO RECOGNITION OF FOREIGN PROCEEDINGS UNDER THE MODEL LAW

***DETERMINATION OF COMI. EU REGULATION 1346/200 AND UNICTRAL LEGISLATIVE
GUIDE***

By

Lucio Ghia

Studio Legale Ghia
Rome

June 21-22, 2012



STUDIO LEGALE GHIA

ROMA – MILANO

Avv. Lucio Ghia

Avv. Daniela Ciardo
Avv. Enrica Maria Ghia
Avv. Andrea Pivanti

Avv. Livio Lamberti – Bocconi

Avv. Tiziano Buzzolani
Avv. Claudio Ghia
Avv. Nello Sabatino
Avv. Alessandro Giorgetta
Avv. Monica De Angeli
Avv. Riccardo Demontis
Avv. Maurizio Falchi
Avv. Carlo Ghia
Avv. Dario Scimè

Dott. Giovanni Stracqualursi
Dott. Roberto Mattera
Dott.ssa Alessandra Ricciuti
Dott.ssa Sara Caputo
Dott.ssa Ida Mastrosera
Dott.ssa Alessandra Rovescalli
Dott. Fabrizio Celestini

INTERNATIONAL INSOLVENCY INSTITUTE

XIIth ANNUAL CONFERENCE

PARIS, JUNE 21ST 2012

By Avv. Prof. Lucio Ghia

1. DETERMINATION OF COMI. EU REGULATION 1346/2000 AND UNICTRAL LEGISLATIVE GUIDE.

EU Regulation 1346/2000 is the most important intervention made within European Union for the ruling and coordination of cross-border insolvency cases involving debtors settled in European Member States.

The principles which have inspired the Regulation, which aimed to guarantee the creation of an area of freedom, security and justice, can be summarized as follows:

- guarantee the proper functioning of internal markets of the Member States;
- avoid the improper transfer of the debtors' assets;
- avoid the interruption of judicial proceedings, because of the starting of other proceedings in other countries;
- avoid conflicts between Courts and administrators of the debtors' assets.
- guarantee mutual trust between Member States;
- guarantee the best judicial and extrajudicial solutions for the creditors' satisfaction, privileging the local jurisdiction where an insolvent economic operator has exercised its activity.



STUDIO LEGALE GHIA

ROMA – MILANO

The Regulation applies to all those insolvency proceedings which determine the separation of the debtor from its assets, through the appointment of an insolvency administrator in order to satisfy the creditors.

In order to apply the afore mentioned principles, the Regulation establishes the general rules that each Member State must follow in case of Cross Border Insolvency.

To this aim, the Regulation provides two different levels of rules:

1) A first “universalist” level, based on the concept of COMI (Center of Main Interests), on the basis of which it can be “easily” identified the State having jurisdiction on the “main proceeding” opened where the “debtor conducts the administration of its interests on a regular basis and is therefore ascertainable by third parties”¹.

On the basis of this principle, the main proceeding is ruled by the laws of the country where it is opened and it is automatically recognized in all the Member States without any kind of formality.

2) A second “local” level, which mitigates the first and limits the powers of the administrator of the main proceeding. On the basis of this concept, the universalist position of the main proceeding is tempered by the opening of secondary local proceedings countries where the debtor has an establishment or “*any place of operation where the debtor carries on a non-transitory economic activity with human means and goods*”².

This second level aims:

- a) to support the main proceeding, through the coordination and cooperation the administrators of the debtors’ assets;
- b) to protect local creditors from the main proceeding and let them satisfy their claims on the assets based in their country.

As a result, the Regulation allows the possibility for different procedures to take place and be ruled by different laws at the same time.

However, this “territoriality” principle for the opening of insolvency procedures received in the Regulation referring to the localization of main proceedings in force of the concept of COMI needs some more specifications after the interpretative and executive disagreements which derived from its application.

In fact, can it be recognized as satisfying the definition of COMI given by EU Regulation, when in the office of a company, especially if this company is part of a group, we can find a door plate, or a commercial office or a law firm, or otherwise just an employee?

¹ Paragraph 13 of the Premises, Regulation n. 1346/2000.

² Art. 3.3, Regulation n. 1346/2000.



STUDIO LEGALE GHIA

ROMA – MILANO

Nevertheless the door plate offers the factual elements detectable by third parties with regard to the legal office of the company, registered in the companies records of a certain country.

But if the directors come from a foreign country, if the decisions are taken in another European country, if the most valuable assets are located in a foreign country, is it juridically satisfying to lever on the presumption determined by the registration in the records of a certain country, by the appearance and by the timeliness of the request?

Substantially, under a juridical profile, either Eu Regulation no. 1346/2000, either the UNCITRAL Legislative Guide, with regard to the determination of the COMI, provide a simple presumption, *iuris tantum*, in favor of the place where the company is registered and where there could be the perception by Third Parties of a stable organization.

Therefore various criteria have been provided, that the domestic jurisdictions take in consideration in order to rebut this presumption.

National Courts, in fact, have excluded the COMI in the place of registration, when the headquarters of the company, or otherwise the administrative “decision making” center of the debtor are located in other place.

Again, in other cases the Courts have preferred the main center of affairs where the central offices are located, or where the management activities are made, or otherwise the place where the principal assets of the debtor or the establishments with the major number of employees are located.

In most part of these cases, the presumption of COMI in a place where a letter box is located has been rebutted.

In most cases, it has been started an inquiry in order to determine the place where the company granted its essential activities and a relevant attention for the decision has been given to the reasonable belief of Third Parties for the determination of COMI.

We can now address the attention to the observations made by OCSE with reference to the concept of “stable organization” which, according to article 5 of OCSE’ s Model 2010, means that a State’s right to tax the incomes of an enterprise settled in another State must be determined having regard to the places and the bases in which the business of the company are settled³.

This concept is particularly important for groups of companies, in order to ascribe in the right way the incomes to the company which actually gets income (the holding or the stable organization) and could be used in the event of a cross border insolvency procedure with a view to identify the COMI and accordingly determine the competence of the European Courts and also the main or secondary nature of the procedures.

³ OCSE’s Model has been fully acknowledged by the Italian system by the introduction of article 162 T.U.I.R., that identifies the stable organization as a fixed base of business through which the non-resident enterprise carries out in full or in part its activities in the State.



STUDIO LEGALE GHIA

ROMA – MILANO

Actually, it does not exist in any national or international system a uniform and common definition for “groups of companies”.

In the same Italian system, the legislator, even without specifying what “groups of companies” are, has determined the coordination and control relationships between companies and also defined the liabilities⁴, penalizing the companies which, in leading and coordinating their subsidiaries, do not comply with fair entrepreneurial management.

This fundamental base is intended to identify the relationships between different companies belonging to the same group and also to determine the effects of the holding’s activities on the subsidiaries and vice versa.

In order to do so, article 3 Law Decree 30th of January 1979, no. 26 (known as Prodi Law, introducing the extraordinary administration procedure of the enterprises in crisis), provides that companies subject to extraordinary procedure are those ones which: a) directly or indirectly control the company in extraordinary administration, b) are directly or indirectly controlled by a company in extraordinary administration, c) having regard to the composition of the management, it turns out that are subject to the same management of the company in extraordinary administration, d) have given credits or guarantees to a company in extraordinary administration.

In the light of these principles, it may be taken into consideration the possibility to interpret the concept of COMI having regard to the management and control relationships involving companies settled in different States, in order to identify the centre of main interest with the company’s base but also with the stable organization according to OCSE’ s Model, with a view to figure out where plants, assets, staff and interests are actually settled.

2. Coordination issues.

From a deep exam of national laws and international experiences which have brought to the creation of Guidelines, agreements and international regulations on insolvency, it is evident that the concept of “insolvency” or “opening of and insolvency procedure” changes as from a national level, the insolvency involves also international, or European, issues.

Within a single national law system, in fact, the principles at the basis of insolvency procedures are “universality” and “unity”: the assets must be separated from the insolvent debtor and acquired within the insolvency mass. All the creditors of the insolvent can put into act their claims only and exclusively within the opened insolvency procedure.

The concept of insolvency proceeding changes when the scenario in which the debtor is the principal actor spreads into the international, or EU, context. In this case, it is necessary to

⁴ Article 2497 of Italian Civil Code provides that: “Companies or entities which, in carrying out their control and coordination activities, do not comply with fair entrepreneurial management, are directly liable towards their shareholders for the damages occurred to profitability, to the value of the shares, to creditors and to the company itself. There is no availability when the damage does not seem to be occurred thanks to efficient control and coordination activities carried out



STUDIO LEGALE GHIA

ROMA – MILANO

change from a universalist point of view to a territorial one, which involves all the jurisdictions of those States in which the debtor has secondary structures⁵.

From this issue derives the necessity of rules which permit the coordination and cooperation between the various protagonists of insolvency procedures.

On this point, it is useful to quote the work made by III within the project on cross-border insolvency which involved NAFTA States (Mexico, United States of America, and Canada), and brought to the development of Guidelines applicable to the exchange of information and communications “Court – to – Court”⁶.

Inspired to the principles of coordination set forth in Chapter 15 of the U.S. Bankruptcy Code, the work highlights that, notwithstanding the role of administrators of insolvency proceedings, it is important and necessary to enhance the circulation of information also between Courts involved in the insolvency cases, in order to create a much better coordination between all the subjects involved in the procedure for the best result and fastest liquidation of insolvency procedures.

Also UNCITRAL Legislative Guide- has taken into consideration the aspects related to the cooperation between the jurisdictions of those States where insolvency procedures have been opened in relation to the same debtor.

Chapter IV (articles 25-27) of the UNICTRAL Model Law, in fact, is inspired by the concept of enabling courts and insolvency administrators from two or more countries to be efficient and achieve optimal results for the best administration of the insolvency procedure.

In particular, article 27 provides that the cooperation can be implemented also through the approval or implementation by courts of agreements concerning the coordination of proceedings and through the coordination of concurrent proceedings regarding the same debtor⁷.

As examples of these kind of agreements and communications between Courts inspired by UNCITRAL Model Law, we can quote three cases: Matlack (2001), Lehmann Brothers (2008) and Madoff (2009).

In all these cases, the agreements between the Courts permitted the definition of the terms and of the admissibility requirements for the claims and the operative modalities of exchange of information which should be applied for the better management of the local insolvency procedures. Lehman Brothers insolvency, as an example, involved almost 16 States with completely different jurisdictions and required a coordination not only between the administrators of the procedures, but also between the Courts involved⁸.

⁵ On these issues see Avv. Cecilia Carrara “Giurisdizione Italiana in Materia Fallimentare ed Effetti del Fallimento dichiarato all'estero”, page 1, worksheet published within the lessons of a Seminar on International Procedural Civil Law organized by AIGA with the Rome Bar Association.

⁶ See “*Guidelines applicable To Court-to-Court Communications In Cross Border Cases*”, published by the American Law Institute and International Insolvency Institute, Washington DC, May 16, 2010.

⁷ *Practice Guide on Cross Border Insolvency Cases*”, UNCITRAL, United Nations, 2010, pages 21-25.

⁸ Cfr. “*Practice Guide on Cross Border Insolvency Cases*”, UNCITRAL, United Nations, 2010, pages 93 and 123-124.



STUDIO LEGALE GHIA

ROMA – MILANO

This coordination, for example, would help to avoid the problem regarding the filing, the determination and the admission of claims in those cross-border insolvencies involving large number of creditors settled in different States.

As it can be easily noted from the lecture of the premises of EU Regulation 1346/2000, also this provision has been issued with the aim of promoting the cooperation between the administrators of the main and secondary insolvency proceedings through the exchange of information.

However, in recognizing the necessity of cooperation between the proceedings' operators, the Regulation does not highlight the role of Courts, Judges and Chancelleries involved in the procedures and does not give evidence of necessity of communication between these subjects.

Article 3.1 of the Regulation, in fact, provides that administrators of the insolvency procedures shall reciprocally communicate, exchange information with regard to the requests of the claims admission, to the verification of the claims and to other procedural measures.

An example of this cooperation can be seen in an agreement that has been signed on May 7, 2010 between the Italian Bar Associations of lawyers and auditors and their respective French colleagues. This agreement aims to strength cooperation between the professionals engaged in the pending cross border insolvency procedures and constitutes a good starting point which indicates also the practical modalities regarding the treatment of the mass of creditors and the active elements of the debtor subject to insolvency proceedings in both countries, by promoting the circulation of information and the acknowledge by creditors of all the necessary formalities for the filing and admission of their claims.

Notwithstanding the absence of provisions regarding the cooperation between Courts on this issue, it is important to highlight that some Courts have already started this kind of coordination.

As an example, it is useful to quote a provision issued by the Court of Monza on November 16 2007, issued within the bankruptcy procedure of Nylstar, a multinational enterprise specialized in the textile area, settled in Cesano Maderno, Italy, with establishments in Spain, France, Germany and Poland.

In this case the above mentioned Court has affirmed its commitment and availability to provide to any interested Court and party, in compliance with a general confidentiality duty, any information which might be useful for the whole proceeding to be successfully carried out, with the exception of those information which might cause a conflict of interest between the procedures.

Another interesting case is the one which involved BenQ Holding BV, a Dutch holding company, and its German subsidiary BenQ OHG⁹. In this case, in fact, subsequently to the filing of two requests of opening of insolvency procedures made by BenQ OHG in Amsterdam and in Munich, the judges of the Courts of the two cities started immediately to communicate and coordinate trough phone calls in order to exchange information and decide which of the two

⁹ See Cristoph Paulus “ The Adfermath of Eurofood – Benq Holding BV and the deficiencies of the ECJ decision” in 200, *Insolvency Intelligence*, pag. 85.



STUDIO LEGALE GHIA

ROMA – MILANO

Courts was competent for the opening of the main procedure. After one month, Amsterdam Court opened a main proceeding and, after a few days, the Munich Court started a secondary proceeding.

Also my law firm, in Parmalat Case, in filing claims for assurance funds and foreign banks with attached documents which gave evidence of the admissibility of the claims, encountered difficulties because of the differences between the domestic law and foreign law systems.

These examples certainly demonstrate that a deeper level of communication also referring to the applicable legislation is required in order to guarantee the highest level of protection for the creditors and all the parties involved in the proceedings, is also necessary to ensure the greatest transparency and fair play.

3. Applicable law

Regulation n. 1346/2000, in the clear intent to increase the cooperation within different insolvency procedures, establishes rules on the applicable law for the claims lodgement, provides information obligations and rules for the credits verification.

However, these rules show some contradictions, as they are not particularly clear and, in practice, have produced several misunderstandings over the course of time.

In fact, as we all know, in the first part of the Regulation, the European legislator in compliance with the *lex concursus* principle, leaves to the States in which the procedure has been opened the definition of the claims lodgement discipline and the determination of the anteriority of the credit in respect of the opening of the procedure (art. 4, par. 2 Reg. no. 1346/00).

In particular, article 4, paragraph 2, letters g) and h), provides the domestic jurisdiction of the insolvency procedure, which means that the State where the procedure has been set will determine the conditions for the opening, development and closure of the same procedure and, with reference to creditors, the State will also set the discipline for:

- claims lodgement and the treatment of those ones lodged after the opening of the procedure.
- rules on the claims lodgement, their verification and admission.
- creditors' rights after the closure of the procedure.

This principle is based upon the fact that each Member State has its own rules on determination, content, type of claim, timetable, documents, formalities and all the events which may determine the anteriority of the credit in respect of the opening of the procedure and the evaluation criteria the liquidator and the judicial authority must comply with, in order for the claim to be admitted.

To sum up, each State adopts its own procedures.

3.1. Claims lodgement and requirements provided under local laws.

Article 93 of the Italian Insolvency Law no. 247/1942, recently amended by legislative decree no. 167/2007, provides that any creditor who intends to lodge a claim must indicate:



STUDIO LEGALE GHIA

ROMA – MILANO

- a) the amount of the credit;
- b) the facts at the base of the claim;
- c) the existence of any privileges;
- d) the documents giving evidence of the claim, which must have a reliable date;

In Italy, the insolvency procedure's representatives are considered as third parties in respect of the debtors and its creditors. Therefore, the liquidator must verify that the claims and the documents supporting the claims are provided with a reliable and certain date proving the anteriority of the credit against the declaration of insolvency. Therefore, according to articles 2699 and 2704 of the Italian Civil Code, these documents must be provided with a "reliable date" which certifies the anteriority of the credit against the opening of the insolvency procedure.

In practice, the date of the documents may be certified by a public notary or otherwise, it may be proved by means of presumptions, for instance particular events such as the death of one of the parties, the winding up of the company, the contract registration, invoices, the extract of an account book: all these events are intended to prove the anteriority of the credit.

In the event a creditor is not able to prove the reliability of the date, it is up to the Receiver to verify the anteriority of the credit on the ground of the account books and also make sure that there are no elements which may hamper the claim (statute of limitation).

If the Receiver or the judge verify the lack of documents supporting the anteriority of the credit, after hearing the debtor and in consultation with the other creditors, the claim is rejected.

In the other European Countries, the treatment for the claims admission is different: in Germany, for instance, each claim must be lodged in writing and provided with any documents proving the existence of the credit, such as contracts and invoices and then is admitted to an examination hearing in which the Court does not investigate the ground of the claims that have been lodged but just notes whether they are disputed by the insolvency administrator, the insolvency debtor or an insolvency creditor. If not, the claims are admitted straight away without any further evidence being required.

On the other hand, the Spanish system requires that the creditors must lodge their claims by sending a signed letter to the administrators together with the invoice or other documents giving evidence of the claim.

According to the Spanish provision, the anteriority of the credit is assumed, until proved otherwise, by the circumstance that before any formal communications, the creditor is not in a position to know about the insolvency procedure.

In France, the creditors' representative proceeds with an initial verification of the claims, and after that, the admission or the rejection is up to the bankruptcy judge.

3.2. Requirements for claims admission

The Chapter IV of the Regulation no. 1346/00 provides the general rules on the information the creditors must be provided with by the Receivers and the judicial authority.

Via delle Quattro Fontane n. 10 – 00184 – Roma
Tel. 06-42012618 r.a. - Fax. 06-42012522 / 06-42001968
e-mail: lucioghia@studiolegaleghia.it
www.studiolegaleghia.it



STUDIO LEGALE GHIA

ROMA – MILANO

In particular, article 39 provides that any creditor who has its residence, domicile or legal base in a Member States different from the one in which the insolvency procedure is set, may lodge its claim within that procedure.

This article needs to be coordinated with article 32 which provides that any creditor may lodge its claim in the main proceedings and in any secondary proceedings, whose coordination is granted by the cooperation and the information exchange between the Receivers.

A problem of coordination between the Regulation and the national disciplines comes from article 41, which provides that *“a creditor shall send copies of supporting documents, if any, and shall indicate the nature of the claim, the date on which it arose and its amount, as well as whether he alleges preference, security in rem or a reservation of title in respect of the claim and what assets are covered by the guarantee he is invoking”*.

Even if it is not specified whether article 41 of the Regulation is intended to apply indifferently to all creditors, both national and foreign, it can be related only the foreign ones as it is inserted in the part of the Regulation dedicated to the category of the foreign creditors.

Therefore, this rule, in case it is considered as an exception to letter h) article 4 of the Regulation, which provides that the determination of the conditions for the claims lodgement, verification and admission is up to the law in force in the State where the procedure is opened.

The problem is that, according to the *lex concursus* principle under article 4, letter h) of the Regulation, the lodgement should be ruled by the law in force in the State where the insolvency procedure is set up, but actually, the same Regulation contains an exception to that principle in article 41 which lists the minimal requirements for the claim lodged by foreign creditors.

The contemporary presence of a general rule -article 41- and a particular rule -art.4-, may be sorted out by a disposition on the minimum content of the claims, in order to avoid the risk of a non-uniform application and interpretation of the Regulation.

For example, the Regulation does not mention the matter of the anteriority of a credit in respect of the opening of the procedure, while the Italian Insolvency Law requires the element of the reliable date.

Furthermore, considering that article 25, paragraph 1 of the Regulation, in providing the automatic acknowledgment in any Member State of the decision about the development and the closure of the insolvency procedure, may put at risk the balance of the claims admission and acknowledgment.

As a result, having considered the actual separation of the procedures, if a creditor lodges its claim both in a main and in a secondary procedure, there may be a conflict of judgements as there would coexist two separate judgments, both based upon different formal presuppositions belonging to different legal systems.

For instance, in the event the main procedure was pending in Italy and the secondary one in France, having granted that the creditors may lodge their claims in both the procedures, the same claim may be admitted both in Italy and in France even if based upon different requirements.



STUDIO LEGALE GHIA

ROMA – MILANO

The difference of admission the criteria may negatively influence on the position of the creditors and alter the *par condicio creditorum*, which according to the aim of the Regulation, should be granted.

This problem was also faced within the UNCITRAL which has designed a model of law for cross-border insolvency matters, highlighting in particular the need for a stronger cooperation between Courts and Receivers, in order to avoid the risk of rejection in a country and contemporary admission in another country.

To sum up, it seems appropriate that the articles regarding creditors and admission criteria would be reviewed in order to grant a more uniform regulation of the access to the procedures pending in different States and of the claims admission.

For example, the criteria concerning the delays as adopted by the domestic legislation (art. 101 of the Italian Insolvency Law) should be more coordinated and communication regarding this issue should be implemented between Courts, creditors and administrators of the insolvency proceedings

Avv. Prof. Lucio Ghia